Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-150

DIANN PRAETORIUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN L. SCHMUKLER
DILLER, SCHMUKLER & ASNESS
Attorneys for Petitioner
345 Park Avenue - 21st Floor
New York, New York 10022
(212) 371-1400

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In The

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No.

DIANN PRAETORIUS,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner Diann Praetorius respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Eastern District of New York, convicting petitioner of conspiracy to import heroin in violation of 21 U.S.C. §846.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court in a summary judgment, which is annexed hereto as Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1979. A petition for rehearing with a suggestion for rehearing en banc was denied by the court of appeals on June 29, 1979. The order denying said petition is annexed hereto as Appendix B.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, consistent with petitioner's Fifth and Sixth Amendment rights, the trial court could compel the deadlocked jury, who had revealed its numerical split (11-1 for conviction) to continue deliberations notwithstanding one juror's personal plea to the court to be discharged because of emotional and physical exhaustion after four days of deliberations.

STATEMENT OF THE CASE

Indictment No. 78 Cr. 135(S)(2) charged petitioner and seventeen other individuals with various violations of the federal narcotics laws. Count One charged Charles Praetorius, petitioner's husband, with conducting a continuing criminal enterprise (21 U.S.C. §848). Counts Two through Ten charged all defendants with conspiracy and substantive violations of the narcotics laws. After a seven week trial the jury reached the following verdicts:

DEFENDANT	COUNT	VERDICT
1. Charles Praetorius	One	Not Guilty
	Two	Guilty
	Three	Hung
	Four	Hung
	Five	Guilty
	Six	Hung
	Eight	Hung
	Nine	Hung
	Ten	Hung
2. Diann Praetorius	Two	Guilty
	Eight	Hung
3. Frederick Praetorius	Two	Hung
	Seven	Hung
	Ten	Hung
4. Kenneth Clark	Two	Not Guilty
	Six	Hung
	Eight	Hung
5. Vincent Auletta	Two	Hung
	Eight	Hung
6. Eric Romandi	Two	Not Guilty
	Eight	Hung
7. Louis Juan, Jr.	Two	Guilty
	Six	Hung
8. Michael Lanza	Two	Hung
	Ten	Hung
9. Kenneth Lebel	Two	Hung
	Ten	Hung

10. William Burley	Two	Hung
	Ten	Hung
11. Gail Harris	Two	Hung
	Ten	Hung
12. Carlotta Ragan	Two	Hung
	Four	Hung
13. Doris Jackson	Two	Not Guilty
	Four	Hung

The indictment, which superseded two previous ones, also charged Glenston Page Laws, Audrey Plunkett and Brenda Hollenback, all of whom were severed and testified for the Government. Two additional defendants, Kathy Paige Sargent and Joseph Smith, were also charged, but their cases were severed prior to trial. They did not testify.

I. The Trial

A. The Government's Case

The Government sought to prove that the defendants, together with unindicted co-conspirators Ralph Abruzzo and Kenneth Pollitt,[1] made a series of trips to Bangkok, Thailand, from September 1976 through December 1977 and, under the supervision of Charles Praetorius,[2] imported quantities of heroin. Each trip constituted a substantive count in the indictment.

1. Abruzzo and Pollitt were named in the original indictment, but subsequently testified for the Government.

2. Praetorius' position in the alleged scheme was the basis of the §848 count against him.

The first trip occurred in September 1976 (Count 3). Charles Praetorius and Abruzzo, co-workers for New York Airways at La Guardia Airport, traveled together and in Bangkok were introduced to a person by the name of "Nui", from whom they purchased slightly more than two ounces of heroin for $600 (Abruzzo, 990-996).[3]

In April 1977, another trip occurred (Count 4), the participants being Charles Praetorius, Abruzzo and defendants Carlotta Ragan and Doris Jackson. Praetorius and Abruzzo purchased two kilograms of heroin from Nui and thereafter had some of the drugs taped on the bodies of the females (Abruzzo, 1005-1012). On their return flight they stopped in London and got hotel rooms, but the two women unexpectedly left and returned to New York. Two days later Abruzzo and Praetorius met petitioner and returned to New York. Abruzzo subsequently gave Charles Praetorius the five ounces of heroin he had carried and received $15,600 in several payments during April 1977 (Abruzzo, 1014-1016).

In July 1977 the third trip occurred, with Charles Praetorius, Abruzzo and defendants Kenneth Clark, Louis Juan, Jr., and Glenston Page Laws (Count 6). Two kilos of heroin were purchased and subsequently packed on Juan, Clark and Laws. On the return flight, Praetorius, Laws and Abruzzo traveled together, but during a stop in Teheran, Praetorius and Abruzzo lost their seats (Laws, 314-327; Abruzzo, 1017-1033). Laws continued to New York and upon arrival telephoned petitioner to inform her of her husband's delay in Teheran (Laws, 328).

A few days later, Praetorius, petitioner and Abruzzo went to co-defendant Juan's house in Long Island. Juan, Charles

3. Numbers in parentheses refer to the pages of the trial transcript. Numbers in parentheses preceded by the letter "A" refer to pages of Petitioner's Appendix in the court of appeals.

Praetorius and Abruzzo went into the bedroom and Juan gave them the drugs he had carried (Abruzzo, 1034).

During July and August 1977, Charles Praetorius and Laws discussed Laws' dissatisfaction with his share of the proceeds of the previous trip. Praetorius agreed to lend Laws $24,000 on condition that Laws give him four ounces of the drugs Laws was going to purchase. Subsequently, Praetorius gave Laws $24,000 and introduced him to his brother Frederick Praetorius (Laws, 328-341).

Laws went to Bangkok in August 1977 (Count 7) with defendants Audrey Plunkett, Kathy Paige Sargent and Joseph Smith. Plunkett had been sent there by a man named Daniel Warren,[4] who had given her money to give to Laws and she subsequently brought back drugs (Plunkett, 1945-1992). While in Bangkok, Laws purchased three or four kilos of heroin for $40,000. He also saw Fred Praetorius in Bangkok and apparently gave him four ounces to give to Charles Praetorius. When Laws returned to New York Charles Praetorius acknowledged receiving the four ounces from Fred Praetorius (Laws, 341-349).

In September 1977 another trip took place (Count 8). On this occasion in addition to Charles Praetorius and Abruzzo, the following persons went along: petitioner, defendants Kenneth Clark, Eric Romandi, Vincent Auletta and Kenneth Pollitt. After arrival in Bangkok, there was a discussion in Charles Praetorius' hotel room about the fact that Romandi had not yet arrived. During this discussion petitioner was not present (Abruzzo, 1036-1039; Pollitt, 2000-2003).

The next day petitioner, Abruzzo, Pollitt and Auletta were in the lobby of the hotel when they saw Charles Praetorius

4. Warren was a partner of Laws, but he was not indicted (Laws, 403-426).

carrying a shopping bag. A few minutes later he came to the lobby and told them he had received only half of the four kilos they were to obtain. Some time later Nui called and told Charles Praetorius that the money he had received was not enough and that Abruzzo and petitioner should bring an additional $1,000 per kilo. Abruzzo and petitioner thereafter went with the money to the Stockholm Club. One of Nui's friends brought Abruzzo to a restaurant while petitioner remained at the club (Abruzzo, 1038-1042; Pollitt, 2004-2006). Two or three hours later Abruzzo was told the rest of the heroin would be in a cab waiting outside. He went to the cab, found the heroin and returned to the hotel room. Petitioner was not there at that time, but came back about an hour later and said she had given the money to Nui (Abruzzo, 1042-1043). Two days later the heroin was weighed and packaged and placed on Clark, Pollitt, Auletta and Romandi [5] (Abruzzo, 1043; Pollitt, 2007-2010).

On September 28, Abruzzo, Charles Praetorius and petitioner left Bangkok, the others having left four or five days earlier with the drugs (Abruzzo, 1085). Two days after arrival in New York, Pollitt met Charles Praetorius and Abruzzo at La Guardia Airport and gave Abruzzo the heroin. He received $20,500 from Abruzzo (Pollitt, 2011-2112).

In December 1977, Abruzzo spoke with petitioner who told him that her husband, Laws and Fred Praetorius had gone to Bangkok and that her husband wanted Abruzzo to call him in Bangkok. Abruzzo did not go on that trip (Abruzzo, 1087).

The trip referred to was the last to occur (Count 10). On that occasion, Charles Praetorius, Laws, Fred Praetorius, Kenneth Lebel, William Burley, Michael Lanza, Audrey Plunkett, Brenda Hollenback, Gail Harris and Kathy Sargent

5. Romandi had arrived a few days after the others.

went.[6] Laws gave Charles Praetorius $30,000 which was later given to Nui. The next day Fred Praetorius received a suitcase full of heroin which he gave to his brother. The heroin was subsequently packaged and placed on the individuals (Laws, 366-367).

In March 1978, Laws went to Thailand alone, purchased drugs and was subsequently arrested in England on his return (Laws, 376). He subsequently entered into an agreement with the United States Attorney that, in exchange for his testimony, whatever sentence he was to receive in the United States would run concurrently with the sentence imposed in England (Laws, 377).

In addition to the foregoing testimony the Government introduced passports, airline tickets and hotel registration cards of various witnesses and defendants (337; 383-385; 992-993; 998; 1020; 1083; 2281-2285).

With respect to the distribution counts (Counts 5 and 9) against Charles Praetorius, a Jacob Hunt testified that from the fall of 1976 until June of 1977 he bought varying amounts of heroin from Charles Praetorius which he in turn sold to others. In June 1977 he sold some of the heroin he had received from Charles Praetorius to an undercover police officer and was subsequently arrested (Hunt, 1716-1738).

Kenneth Pollitt also testifed that in October 1977 he sold one gram of heroin, which he had received from Charles Praetorius for free, to a Suffolk County undercover officer and

6. Hollenback, Harris and Plunkett went there pursuant to instructions from Daniel Warren and each carried drugs given to them by Laws back to the United States (Laws, 366, 367; Hollenback, 1843-1859; Plunkett, 1979).

was arrested for that sale in January 1978.[7] As indicated, the jury convicted Charles Praetorius of the June 1977 (Hunt) distribution, but was not able to reach a verdict as to the October 1977 (Pollitt) distribution.[8]

B. The Jury Deliberations

On October 19, 1978 at 3:25 p.m., the jury retired to deliberate on its verdict (3687). For the next several days they made several requests for reading of testimony and supplemental instructions (3692; 3703; 3711-3712; 3772; 3797).[9] On the seventh day, October 26, at 3:25 p.m., the jury sent a note (Court Exhibit 16) setting forth their "verdicts" (A101-103). The only unaminious verdicts were as to Charles Praetorius, acquitting him on count one and convicting him on Counts two and five. As to the other counts and defendants, the jury was split.[10] All counsel thereupon moved for the jury's discharge (A103). The motion was denied (A106). After recording the verdicts as to Charles Praetorius (3894-3897), the court recessed to the following day.

The next morning the court received a note from the jury forelady requesting a "private audience" with the judge (A107).

7. With respect to this count, the Suffolk County police officers involved in the sale also testifed for the Government (Gunyan, 2338-2346; Gatta, 2346-2348; Ciappetta, 2360-2364; Sawiski, 2399-2400).

8. All of the unresolved counts against petitioner and her husband were subsequently dismissed by the district court.

9. On October 25th there were no deliberations due to the illness of one of the jurors (3815-3816).

10. The jury "verdicts" detailed the numerical split as to each defendant and each count. As to petitioner, the jury was 11-1 for conviction on the conspiracy count and 10-2 for conviction on the one substantive count (Count 8).

With the consent of all counsel, the court had an *in camera* discussion with said juror, during which she indicated that she had been "mugged", that she was losing $50 per week in salary and that she was "extremely nervous" (A107-112). After colloquy with counsel, the court asked the jury in open court if further deliberations would be fruitful in reaching a verdict (A118-119). Through a note (Court Exhibit 18) the jury indicated that eleven jurors were willing to continue, one was not (A120). All counsel, except counsel for defendant Romandi, thereupon moved for a mistrial (A121). The court denied the motion and instructed the jury to continue deliberations (A121-122).[11]

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11. The complete text of the court's supplemental instructions, modeled after those approved by this Court in *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154 (1896), were as follows:

> "THE COURT: Ladies and gentlemen of the jury. I have your note reading, and marked Court Exhibit 18, and it reads, 'Eleven members of the jury feel further deliberations can be fruitful, while one does not.'
>
> I'm going to ask you to resume your deliberations in an attempt to reach a verdict. As I told you in my opening charge, that you, each one of you, is entitled to his or her opinion, but you should exchange views with your fellow jurors and listen carefully to each other, and you should not hesitate to change your opinion if you are convinced that the other opinion is correct. But the decision must be your own. As a part of the process of making your individual decision, you are to examine the issues with candor and frankness, and with proper deference and regard for the opinions of one another. While a juror must not surrender his or her conscientious belief about the case, you should give attention to and respect to the views of other jurors and listen to their arguments.
>
> I'm going to ask you to return to the jury room and resume your deliberations with a view towards reaching a

(Cont'd)

Four hours later the jury returned a verdict of guilty on Count two as to petitioner and co-defendant Louis Juan (A124-127). The court thereupon inquired if further deliberations would be fruitful, to which the jury responded affirmatively (A127; A128). On October 31, twelve days after they had commenced deliberations, the jury indicated they could continue no longer and were discharged (3996; 3998-3999)

REASONS FOR GRANTING THE WRIT

The writ should issue because the question presented herein, and decided by the court of appeals, is an important one in federal law that should, but has been for many years, settled by this Court.

The writ should further issue because the court of appeal's decision in this case appears to be in conflict with decisions of other circuit courts of appeals on the continued validity of the *Allen* charge.

Finally, the writ should issue because the trial court's *Allen* charge, under the circumstances of this case, coerced the verdict against petitioner, depriving her of her Fifth and Sixth Amendment rights to due process and a fair trial.

Since 1896, when *Allen v. United States*, 164 U.S. 492 was decided, this Court has not passed upon the propriety of a trial court's instructions to a deadlocked jury to continue

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(Cont'd)

> verdict, if that is possible, and bear in mind always that no juror should yield a conscientious belief he or she may have as to the weight and effect of the evidence.
>
> The jury may be excused to continue their deliberations."

deliberations. Yet, these instructions have engendered judicial and scholarly controversy. While no federal court has ever held them to be unconstitutional per se, there is considerable disagreement among the federal circuits and, indeed even the state courts, about the continued validity of these instructions. Thus, as Judge Sobekoff pointed out in his dissent in *United States v. Sawyers,* 423 F.2d 1335, 1345, nos. 3, 4, 5, the third circuit has outlawed use of the charge: *United States v. Fioravanti,* 412 F.2d 407 (1969); the seventh and tenth circuits have severely limited its use: *United States v. Knaach,* 409 F.2d 418 (1969); *United States v. Brown,* 411 F.2d 930 (1969), and Arizona and Montana have banned the charge entirely: *State v. Thomas,* 86 Ariz. 161, 132 P. 2d 197 (1959); *State v. Randall,* 137 Mont. 543, 353 P. 2d 1054 (1960). In addition, the instructions have been criticized extensively in both judicial opinions and legal scholars. *See* authorities collected in the dissenting opinion in *Sawyers, supra,* notes 4 and 5. Nor has the controversy subsided. To the contrary, since Judge Sobekoff's dissent in *Sawyers,* the following additional cases have banned or restricted use of the *Allen* charge: *United States v. Thomas,* 449 F.2d 1177 (D.C. Cir., 1971); *Fields v. State,* 487 P. 2d 831, 836 (Alaska, 1971); *State v. Nicholson,* 315 So.2d 639, 641 (La. 1975); *State v. Martin,* 297 Minn. 359 211 N.W.2d 765, 772 (1973); *State v. March,* 260 Or. 416, 490 P.2d 491, 503 (1971); *Kersey v. State,* 525 S.W.2d 139, 144 (Tenn. 1975). While these decisions were based on the supervisory powers of the respective courts, at least one court has held that the *Allen* charge is violative of constitutional rights; *Commonwealth v. Spencer,* 442 Pa. 328, 275 A.2d 299, 304 (1971).

The uncertainty surrounding the validity of these instructions has been due, in great part, to the absence of guidance from this Court. *See, Note* 22 Loyola L. Rev. 667, 675 (1976); *Note,* 47 N.Y.U. L. Rev. 296 (1972). Petitioner respectfully submits this case is a most appropriate occasion for this Court to settle the issue once and for all because the coercive potential of the instructions is most vivid herein.

At the time the trial court gave its *Allen*-type charge, the jury had been sitting for approximately eight weeks, and had actually deliberated for four full days. Of the thirty five possible verdicts upon which it had been deliberating, the jury had agreed only as to three, all of which dealt with defendant Charles Praetorius. Just prior to giving the instructions, the judge had an *in camera* colloquy with the jury forelady who indicated that she was physically uncomfortable as a result of a leg injury sustained during a recent "mugging" and that she was "extremely nervous" (A107-112). Rather than inquire of the juror whether she felt capable of continuing deliberations, the judge convened the court and inquired of the jury whether further deliberations would be fruitful. Predictably, one juror felt that they would not. In spite of the dissent, the judge gave the challenged instructions without further concern for the forelady's plight. Four hours thereafter, the jury returned a guilty verdict as to two defendants, petitioner and co-defendant Louis Juan. Of particular significance is the fact that as to both these defendants there was only one juror voting for acquittal.

On the basis of the foregoing, petitioner argued before the court of appeals that there was a great probability that the holdout juror and the ill forelady were one and the same, and that her subsequent capitulation to the majority viewpoint was induced by the physical and mental exhaustion about which she had just complained.

The court of appeals' decision on this issue rested entirely on the absence of conclusive proof that the ill forelady was in fact the holdout juror (Appendix A at 3a). Thus, the court seems to have implicitly agreed that if such proof did exist, its decision would have been different. But surely, a showing that the ill juror *may* have been the holdout should suffice to demonstrate that the *Allen* charge was potentially coercive, and therefore should not have been given.

By the nature of things, an issue such as this can never involve absolute certainty, one way or another. Thus, the inquiry does not focus on actual coercion but on the probability of coercion, given the existing circumstances. *E.g., United States v. Robinson,* 560 F.2d 507, 517 (2d Cir. 1977) (*en banc*) ["The propriety of an *Allen*-type charge depends on whether it *tends* to coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts." (Emphasis added.)] *United States v. Thomas,* 449 F.2d 1177, 1181 (D.C. Cir. 1971) ["When efforts to secure a verdict from the jury reach the point that a single juror *may* be coerced into surrendering views conscientiously entertained, the jury's province is invaded and the requirement of unanimity is diluted." (Emphasis added.)] *United States v. Angiulo,* 485 F.2d 37, 40 (1st Cir. 1973). ("The impact [of the *Allen* charge] can never be assessed accurately, for the relevant events take place in the secrecy of the jury room, and never appear in the record. For us to become involved, at this point, in gauging the coerciveness of various *Allen*-type renditions would be to launch us on an unnecessary voyage in judicial reviews.") Accordingly, the court of appeals' reliance on the absence of *conclusive* proof that the holdout juror was the ill forelady imposed an insurmountable barrier to petitioner.

Petitioner further submits that the juror made it clear that she could no longer continue because "you know I was mugged . . ." "I was dragging my leg with an infection on it. And on the other side I have neglected my job sir. I am losing fifty dollars a week and I can't afford it sir" "and I am extremely nervous" (A111-112). Thus, not only was this juror physically uncomfortable, she was emotionally exhausted, a factor that would undoubtedly affect her mental process and thus her ability to intelligently participate in the deliberations.

In short, the problem the jury was having was not curable by an *Allen*-type charge because one of the jurors, most likely the one for whom the charge was intended, was physically and

mentally incapable of applying its principles. Thus, the existence of the ill juror, who, at the very least, could have been the dissenting juror, and her pleas to be excused rendered the giving of the *Allen*-type charge coercive.[12] Of course, the fact that the only defendants subsequently convicted — four hours later — were those as to whom the jury was split 11-1 for conviction strongly supports appellant's contention.

Any other conclusion necessarily rests on the total irrational assumption that upon hearing the court's charge, the ill juror proceeded to deliberate accordingly without regard to the fear for her health she twice expressed. However, the nature of her complaint, and the urgency with which she expressed it, clearly belie the contention that she was unaffected by it during subsequent deliberations.

To the contrary, the more likely possibility is that, having seen her pleas totally ignored, she saw a verdict as the only means of escape and therefore began the process of yielding her positions. Diann Praetorius, being at the top of the list of these to be re-considered on the conspiracy count, was promptly convicted. As to the next several defendants, the split was more substantial so that the juror's vote was not enough to bring about a verdict. The next defendant as to whom one vote would make a difference, Louis Juan, was also convicted. As to the remaining defendants, only the lateness of the hour and the intervention of the weekend, during which no deliberations were had, spared them of a similar fate.

By the following Monday when deliberations resumed, the ill juror had most likely received medical attention, a possibility

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12. *Compare United States v. DeStefano,* 476 F.2d 324 (7th Cir. 1973) (ill juror indicated she was fit to continue); *United States v. Grosso,* 358 F.2d 154 (3rd Cir. 1966) *rev'd on other grounds,* 390 U.S. 62, 88 S. Ct. 709 (1968) (no objection to continued deliberations by ill juror).

the district court considered in refusing a defense request to provide her with it (3939-3940), and was therefore in a position to continue in appropriate fashion. Thus, the fact that there was a subsequent shift in the verdicts on other counts and as to other defendants[13] during the following week of deliberations does not in any way show that at the time of the *Allen* charge the juror was in a similar, refreshed state of mind.

Although petitioner's foregoing argument is largely predicated on the probability that the ill juror was the one holding out for acquittal, we recognize the possibility that that may not have been the case. But even if the ill juror was already convinced of petitioner's guilt prior to the giving of the *Allen*-type instructions, the coercive effect of those instructions was nevertheless significant.

The *Allen* charge is not to be directed solely to those jurors holding minority viewpoints. *See United States v. DeStefano, supra.* Thus, under an *Allen*-type charge it is entirely possible, and no less desired, that those in the majority will be persuaded by those in the minority. Indeed, it is its very neutrality that has rendered the charge permissible under certain circumstances. *See United States v. Rao,* 394 F.2d 354 (2d Cir. 1968); *United States v. Robinson, supra,* and cases cited therein.

For the reasons that have already been stated, one juror in this case was thoroughly incapable of, or unwilling to have any further participation in the deliberations. As such, she was immune to the process the *Allen* charge sought to encourage and therefore not capable of being persuaded by the minority viewpoint.

In summary, at the time the *Allen* charge was given, there was only eleven jurors functioning as such. The "absence" of the

13. The court of appeals found this to be significant as demonstrating that the continued deliberations were "affecting the votes". Appendix A at 4a.

twelfth, regardless of what her prior vote had been, prejudiced appellant and denied her the Sixth Amendment right to trial by jury.

It is also entirely possible that the dissenting juror was influenced by the plea of the ill juror and in deference to her plight decided to abandon her opinions.

The court of appeals rejected these contentions, indicating that, *inter alia,* since the jury deliberated for four hours after the *Allen* charge before returning the guilty verdict against petitioner and her co-defendant, the instructions must not have had a coercive effect on the dissenting juror.

Petitioner submits that the four hour interval between the charge and the verdict is practically insignificant given the number of verdicts the jury was still considering. Thus, while four hours of deliberations, in an ordinary case, may be indicative of conscientious debate, in this case it was indicative only of the jury's task.

It has been held at an *Allen* charge when the jury is deadlocked 11-1 is not coercive per se. *United States v. Robinson, supra.* It has also been held that such a charge is not improper when one juror is ill. *United States v. DeStefano, supra.* But where, as here, both elements exist, the limit of tolerance for the charge is reached and the instructions should not be permitted.

In this case, the fear expressed by defense counsel that the court's charge might unduly influence the possibly ill holdout became reality when the only verdicts rendered were those against whom one vote made the difference.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Martin L. Schmukler
DILLER, SCHMUKLER & ASNESS
Attorneys for Petitioner

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of May, one thousand nine hundred and seventy-nine.

Present:

Hon. James L. Oakes,
Hon. Ellsworth A. Van Graafeiland,
Circuit Judges.
Hon. Milton Pollack,
District Judge.

Filed May 15, 1975

79-1022

United States of America,

Appellee,

v.

Charles Praetorius, Diann Praetorius, and Louis Juan, Jr.,

Appellants.

Appendix A

ORDER

Appeal from convictions after a jury trial in the United States District Court for the Eastern District of New York, Eugene H. Nickerson, Judge. Charles Praetorius was convicted on one count of conspiring to import, distribute, and possess heroin and one substantive count of distributing heroin; Diann Praetorius and Louis Juan were also convicted on the conspiracy count.

Charles complains that counsel for codefendant Jackson presented in summation a defense that the codefendant was an innocent dupe of appellant. He argues that the court abused its discretion in denying appellant's motion for a severance made at the conclusion of the summation. Appellant relies on *United States v. Johnson,* 478 F.2d 1129 (5th Cir. 1973), and *DeLuna v. United States,* 308 F.2d 140 (5th Cir. 1962).

Johnson is distinguishable because it involved only two defendants and a background of clearly antagonistic defenses presented to the court by pretrial motion and presented at trial by the testimony and confession of the codefendant. *DeLuna,* also involving only two defendants was reversed on Fifth Amendment grounds for comment by a codefendant's counsel on the defendant's failure to testify. The trial court has great discretion in the grant or denial of a severance, and in this instance the summation was insignificant in the context of a lengthy trial. Judge Nickerson repeatedly instructed the jury that the summations were not evidence; the length of the jury's deliberations, the jury's failure to convict Charles on the continuing conspiracy count or the substantive count involving Jackson, the failure of appellant's counsel to object during the summation, and the probability that some defendants would raise the defense of being duped all go to indicate that Judge

Appendix A

Nickerson did not abuse his discretion in denying the motion for a severance. *Cf. United States v. Roberts,* 583 F.2d 1173, 1177 (10th Cir. 1978).

Diann and Louis argue that the jury's verdict was coerced because of the trial judge's failure to discontinue deliberations after the forelady advised him that her health, job, and nerves were suffering because of the prolonged deliberations and after the jury advised that one member did not believe that further deliberation would be fruitful. The court then gave a modified *Allen* charge, and the jury convicted Diann and Louis about four and a half hours later, after a total of almost five full days of deliberations. Diann argues that it is likely that the forelady was the holdout juror who gave in because of her personal and physical problems and that even if the forelady was not the holdout she was unable to participate in the process of cooperation that the *Allen* charge is supposed to induce (that is, be persuaded to the minority viewpoint) and that the holdout might have been induced to give in by the forelady's plight. Louis argues that the court should not speculate on who the holdout juror was because the only important factor is that the holdout did capitulate to the majority.

But it is not possible to say that the forelady was likely to be the holdout juror. She could just as easily have been one of the eleven voting for conviction who realized that because there was a holdout the deliberations would continue longer than she would like. Thus appellants' complaint, notwithstanding their citation of *United States v. Robinson,* 560 F.2d 507 (2d Cir. 1977) (en banc), amounts to an attack on the coerciveness of the situation induced by the *Allen* charge. We can find no inherent coercion. The charge that Judge Nickerson gave was a modified *Allen* charge, the first (and only) such charge given, and it was mild at that. The jurors indicated that they were stalled after four days of deliberation, as they might well be given the length

and complexity of the trial; the charge reminded them of their purpose and persuaded them to deliberate further. No coercion appears here. The jury deliberated four and a half hours after receiving the *Allen* charge before it brought in verdicts of conviction against Diann and Louis; it continued to deliberate, having responded affirmatively and unanimously to the judge's specific inquiry whether further deliberations would be fruitful, even after convicting Diann and Louis; and it showed by the shift in the verdicts on other counts and as to other defendants that continued deliberations were affecting the votes. The situation in *United States v. Pleva,* 66 F.2d 529 (2d Cir. 1933), is completely different from this case.

Finally, Diann Praetorius argues that her sentence was improper because of a material error in the presentence report to the effect that she was a distributor of the drugs. The court could determine for itself on the basis of the evidence presented at the lengthly trial that Diann was involved in distributing the heroin. Moreover, counsel did not properly raise at sentencing the objection that the presentence report was "materially inaccurate," but said only that there was "*virtually* no evidence to substantiate such a suggestion." Moreover, he did not request from the Government disclosure of the source of the information or corroborating evidence, or request an evidentiary hearing. Finally, it is not at all clear that "it is more likely than not that but for the erroneous pre-stence report [Diann] would not have been sentenced as severely as she was" (Br. 26). The court's only reference to the presentence report shows how minimal its effect on the court was: "Obviously this has been a matter that has been on my mind for some time, long before I got the presentence report." Thus, this case does not fall within the narrow strictures of appellate review of sentences. *United States v. Tucker,* 404 U.S. 443, 446 (1971).

The judgments of conviction are affirmed.

s/ James L. Oakes

s/ Ellsworth A. Van Graafeiland
Circuit Judges.

s/ Milton Pollack
District Judge.

APPENDIX B — PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-nine.

Present:

HONORABLE JAMES L. OAKES

HONORABLE ELLSWORTH VAN GRAAFEILAND

Circuit Judges

HONORABLE MILTON POLLACK

District Judge.

79-1022
79-1023
79-1073

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES PRAETORIUS,
DIANN PRAETORIUS,
LOUIS JUAN, JR.,

Defendants-Appellants.

Appendix B

A petition for a rehearing having been filed herein by counsel for the Appellants Charles and Diann Praetorius.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro,
Clerk

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-nine.

79-1022
79-1023
79-1073

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES PRAETORIUS,
DIANN PRAETORIUS,
LOUIS JUAN, JR.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, Charles and Diann Praetorius, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

see

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